

E&E Legal Fact Sheet I: The Biden Administration's Red Tape Threatens To Grind American Industry To A Halt

The Biden Administration is seeking to subject more land and infrastructure projects to its burdensome Waters of the United States rules.

PILING ON MORE RED TAPE

- The Biden Administration recently [announced](#) that people could no longer rely on “approved jurisdictional determinations” or “AJD’s” issued under the Trump Administration.
- These determinations are vital in confirming that land or a project is not subject to federal jurisdiction under onerous Waters of the United States or “WOTUS” rules.
- Landowners, developers, states, and others rely heavily on these determinations when making long-term plans and, eventually, proceeding with projects.
- These determinations, issued by the Army Corps of Engineers under the Clean Water Act, are typically good for five years, and had previously been honored even when the regulations change in the time between getting the determination and applying for the permit.
- The Biden Administration did not go through any apparent process for changing this policy or for actually invalidating the determinations – it merely announced it via website post.

CONTRAVENING ESTABLISHED PRECEDENT

- This move is unprecedented and appears to have been done without any process due to AJD-holders.
- While the Biden Administration has announced it would revert to more stringent 2015 Obama-era WOTUS rules, these AJD’s have been honored in the past even when rules were changed to become more stringent.
- It allows the Biden Administration to “reach back” to upend final decisions of the government, settled expectations of AJD-holders, and apply different rules retroactively.
- It also likely contravenes fundamental administrative law principles under the Administrative Procedure Act (APA) and the Supreme Court’s *Army Corps of Engineers v. Hawkes Co.* decision.
 - That 2016 decision held that AJDs are final agency action judicially reviewable under the APA.

HALTING VITAL IMPROVEMENTS

- The Biden Administration’s action effectively halts important infrastructure, construction, agricultural, and other projects nationwide.
- Projects that had been planned based on the government’s issuance of these AJDs will now have to wait Army Corps of Engineers conducts a new assessment.
 - And does so under older, more-expansive rules that were not in place when the original project was approved.
- Once these new assessments are complete, it is likely that some projects that had already been approved under the Trump Administration must now undertake another costly and time-consuming permitting process.
- Landowners, miners, developers, farmers, and states holding existing AJDs are all rightfully contemplating legal action against this change in policy.